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In the Supreme Court of the United States

OCTOBER TERM, 1979

ESTATE OF JACQUELINE ELKINS SHELTON, DECEASED, DONALD C. LITTLE AND JOHNNIE MOHON, CO-EXECUTORS, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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The petition in this federal income tax case presents the questions: (1) whether income from a decedent's headright share of the Osage Tribal Mineral Trust was taxable to the estate of the deceased, an Osage Indian who had received a certificate of competency; and (2) whether the estate was required to include in income in 1970 a portion of the interest paid on refunded estate taxes of the decedent's mother. Both courts below upheld the Commissioner of Internal Revenue's position that the headright income received by the decedent's executors was properly taxable to the estate on the ground that this Court's decision in *Choteau* v. *Burnet*, 283 U.S. 691 (1931) "is directly in point and controlling" (Pet. App. A2, A23). The decision below also held that the interest

received by the estate was properly includible in taxable year 1970, when it was constructively received by the estate (Pet. App. A3-A8, A29).

1. In *Choteau* v. *Burnet*, *supra*, 283 U.S. 691, this Court held that an Osage Indian who had received a certificate of competency was required to include in income his proportionate share of payments received by the Osage Tribe on mineral leases made by the Osage tribal council pursuant to authorization granted it by the Osage Allotment Act (Act of June 28, 1906, ch. 3572, 34 Stat. 539). After noting that "[his] share of the royalties from oil and gas leases was payable to him, without restriction upon his use of the funds so paid," the Court emphasized that "he has been, with respect to the income in question, fully emancipated," and concluded that "the contrast between his qualified power of disposition of that [homestead] property[1] and his untrammeled ownership of the income in controversy" did not support the view that "with respect to this income the petitioner was restricted, and therefore exempt from the tax * * *." (283 U.S. at 695-696).

The Court continues to cite *Choteau* with approval. See *Superintendent* v. *Commissioner*, 295 U.S. 418, 419, 421 (1935): "Nontaxability and restriction upon alienation are distinct things." Indeed, the Court's decision in *Squire* v. *Capoeman*, 351 U.S. 1 (1956), highlights the point. There, the Court held that proceeds of sale by the United States of standing timber on allotted lands on the Quinaielt

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[1] In *Choteau* v. *Burnet*, *supra*, 283 U.S. at 694, the Court stated that "the [Osage Allotment] Act of 1906 directed the allotment to each member of the Osage tribe of a homestead of 160 acres to be chosen by him, which was to be inalienable and nontaxable for twenty-five years or during the life of the allottee."

Indian Reservation were not taxable to the allottee-Indians. However, the decision turned on the specific language in the General Allotment Act (Act of Feb. 8, 1887, ch. 119, 24 Stat. 388 (25 U.S.C. 349), as amended by the Act of May 8, 1906, ch. 2348, 34 Stat. 182) which the Court found to evidence "a congressional intent to subject an Indian allotment to all taxes only after a patent in fee is issued to the allottee" (351 U.S. at 8). In so holding, the Court specifically noted that "a *competent* Indian, who had unrestricted control over lands and income therefrom, [is] not exempt from income tax solely because of his status as an Indian" (351 U.S. at 9-10, n. 19; emphasis in original). See also *Big Eagle* v. *United States*, 300 F. 2d 765 (Ct. Cl. 1962) (headright income from tribal mineral interests received by noncompetent Osage Indian not taxable); Rev. Rul. 77-78, 1977-1 Cum. Bull. 12 (headright income from tribal mineral interests received by Osage Indian taxable, if recipient has received certificate of competency). Here, as the court of appeals pointed out (Pet. App. A12), "Decedent was an unrestricted Osage Indian at the time of her death because she had received a certificate of competency on September 29, 1950." Accordingly, her estate was properly taxable on the headright income received after her death. Sections 61(a)(15), 102(b), 661(a)(2) and 662(a)(2) of the Internal Revenue Code of 1954 (Pet. App. A3).

2. As a necessary corollary to the cash method of accounting, Treasury Regulations on Income Tax, Section 1.451-2(a) (26 C.F.R.) provides that "Income although not actually reduced to a taxpayer's possession is constructively received by him in the taxable year during which it is credited to his account, set apart for him, or otherwise made available so that he may draw upon it at any time * * *. However, income is not constructively received if the taxpayer's control of its receipt is subject to substantial limitations or restrictions."

Here, as both courts below noted (Pet. App. A3-A4, A14-A16), in January, 1970, the Internal Revenue Service paid a $150,241.96 income tax refund ($92,578.42 of which was allocable to interest) to the Osage Indian Agency, and that amount was credited to the estate account of which the decedent was the sole beneficiary on January 12, 1970. By letter dated March 17, 1970, the decedent's estate's co-executors were advised "that, upon receipt of an additional co-executors' bond, the Agency would disburse the Elkins estate's tax refund to them as co-executors of decedent's Oklahoma ancillary probate estate" Pet. App. A15).

While the estate urged that receipt of the income tax refund was subject to substantial limitations or restrictions, *viz.*, the requirement of the Agency that an additional bond be posted, and that the payment be made to the co-executors in the ancillary Oklahoma estate proceeding, the courts below properly rejected this conclusion.[2] As the court of appeals pointed out (Pet. App. A6): "No case was cited, or found, holding that requiring a normal fiduciary bond in a probate proceeding is a substantial limitation or restriction justifying postponement of income tax consequences until the fiduciary chooses to file it. The fees for such bonds are standard and modest, and would not be different in amount whenever obtained."

Moreover, the courts below correctly concluded that the Agency's insistence that the refund be payable through the Oklahoma proceeding, and not, as the estate urged, through an ancillary Kansas proceeding, did not justify

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[2]Because the Agency withheld 20 percent of the refund for payment of a possible attorney's fee claim, the Internal Revenue Service stipulated that a ratable portion of the refund attributable to interest was not constructively received in 1970 (Pet. App. A8, A16).

postponing recognition of the income for federal income tax purposes. The payment was in reality to the estate, which was the same in both proceedings. The court of appeals therefore properly concluded (Pet. App. A8) that "the co-executors were firmly informed in 1970 that the Agency would not deliver the funds other than to the Oklahoma coexecutors. At this point it was incumbent upon the coexecutors, if they thought that was erroneous, to bring some legal action to secure a different disposition if they wished to avoid constructive receipt."

It is therefore respectively submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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